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JAN 04 2010

CRIMINAL DIVISION  
KING COUNTY PROSECUTORS OFFICE

NO. 64437-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Petitioner,

v.

CESAR CIENFUEGOS,

Respondent.

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RESPONSE TO STATE'S MOTION FOR DISCRETIONARY REVIEW

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CHRISTINE A. JACKSON  
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Attorney for Respondent

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**ORIGINAL**

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JAN -4 PM 4:48

## **I. IDENTITY OF PARTY**

Cesar CienfueCienfuegosgos, defendant in the King County District Court, appellant in King County Superior Court and respondent herein submit this response in opposition to the State's motion for discretionary review.

## **II ISSUES PRESENTED**

- A. Is the State's notice of motion for discretionary review timely when it was filed within 30 days of the decision, but after the mandate was issued? Did the superior court clerk have the authority on its own motion to recall the mandate?
- B. Does this case merit review where the King County Superior Court's decision is controlled by the United States Supreme Court's decision in *Melendez-Dias v. Massachusetts*?

## **III WHY REVIEW SHOULD BE DENIED**

The King County Superior Court's decision follows the controlling precedent set forth in *Melendez-Diaz v. Massachusetts*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), which s binding on all Washington courts on this point of federal constitutional law. State v. Radcliffe, 164 Wn.2d 900, 906 (2008). The State's attempt to distinguish *Melendez-Diaz* in such a manner as to leave *Kronich* and *Kilpatrick* intact are is not

persuasive. As the State points out, this court has already accepted review in another case on the same issue presented here. State v. Moi Moi, COA No. 64327-4-I. Appendix 1. The superior court decision in that case conflicts with the binding authority in *Melendez-Diaz*. Finally, as explained below, the State's notice of discretionary review is untimely and this action should be dismissed.

#### **IV STATEMENT OF FACTS**

The document at issue here is commonly known as the CCDR, certified copy of driving record. Appendix A to State's Motion (Exhibit 10). This document was produced solely for use in the prosecution of Cienfuegos for the crime charged. On its face, the affidavit addresses the status of Cienfuegos' driver's license on "April 15, 3005," the date of the charged incident. The affidavit further states that Cienfuegos was "not eligible to reinstate his/her driving privilege on the above *date of arrest*." (Emphasis added.) The letter records the results of "a diligent search of the computer files, the official record" and is signed under penalty of perjury by a custodian of records on May 9, 2005. The results of that diligent search are stated as follows:

Had not reinstated his/her driving privilege. Was suspended/revoked in the first degree. Subject was not eligible to reinstate his/her

driving privilege on the above date of arrest. Had not been issued a valid Washington license. A notation has been placed on the driving record under RCW 46.20.720 stating that the person may operate only a motor vehicle equipped with an ignition interlock or other biological or technical device from 10/20/2002 to 10/20/2005.

Attached to the CCDR was an order of revocation. Appendix A to State's Motion (Exhibit 9). Exhibit 10 was the only evidence presented to prove the status of Cienfuegos' driver's license on the date in question. This declarations made in this document are the only evidence that, on the date of his arrest, Cienfeugos' has not reinstated his driving privilege, that he was not eligible to do so and that a notation requiring an ignition interlock device had been placed on his driving record.

Based on this evidence, Cienfuegos was convicted of Driving While License Suspended, First Degree. He successfully appealed to the King County Superior Court, which ruled that the CCDR is testimonial evidence and violates the precedent set forth in *Melendez-Diaz*. Appendix B to State's Motion. The State now seeks review.

## V. ARGUMENT & AUTHORITY

### A. *Melendez-Diaz* binds all Washington courts on questions of federal constitutional law. The King County Superior Court properly applied the authority in *Melendez-Diaz* in this case.

Admission of the Exhibit 10 (known as the "CCDR") violated Cienfuegos' right to confrontation. That document is an affidavit signed under penalty of perjury and contains statements that are testimonial as held in *Melendez-Diaz v. Massachusetts*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2527, 174 L.ed.2d 314 (2009). *Melendez-Diaz* held that statements in affidavits are testimonial when they "made for purpose of establishing or proving some fact" and "under circumstances that would lead an objective witness to believe that the statement would be available for use at a later trial." *Id.*, 129 S.Ct. at 2532. The statements in the Exhibit 10 are testimonial under *Melendez-Diaz* because they are "a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it." *Id.* at 129 S.Ct. at 2539. Even if Exhibit 10 qualified as a public or business record, the statements are testimonial because the document was "prepared specifically for use at [appellant's] trial-were testimony against [appellant], and the [author was] subject to confrontation under the Sixth Amendment." *Id.*, 129 S. Ct. at 2539-40. Exhibit 10 specifically presents testimony

regarding the status of Cienfuegos' driver's license on the "date of his arrest" on "April 15, 2005" and was created for this prosecution. The Washington Supreme Court recognized that the documents commonly known as CCDRs are "literally prepared for purposes of litigation and [] intended to be relied upon by the State. Likely, the DOL certification here was probably not kept in the normal course of DOL business." State v. Kirkpatrick, 160 Wn.2d 873, 885, 161 P.3d 982 (2007).

While the Washington Supreme Court previously held that the admission of CCDRs do not violate the confrontation clause, the United States Supreme Court's decision in *Melendez-Diaz* is binding on all Washington courts on this point of federal law. State v. Radcliffe, 164 Wn.2d 900, 906 (2008).

The Sixth Amendment guarantees a defendant's "right to confront those who bear testimony against him." As the Supreme Court recently held, the Sixth Amendment "does not permit the prosecution to prove its case via out-of-court affidavits" and "the admission of such evidence . . . [is] error." Melendez-Diaz, 129 S.Ct. at 2542. The CCDR in this case states that after a diligent search of Department of Licensing records, the Defendant's license was suspended in the second degree and defendant's license had not been reinstated. Admission of the CCDR would violate Defendant's Sixth

Amendment right to confront the witnesses against him by allowing the City to prove its case in precisely the fashion that *Melendez-Diaz* prohibits, and thus this Court must exclude the CCDR.

A witnesses' testimony against a defendant is inadmissible unless the witness appears at trial, or, if the witness is unavailable, the defendant has had a prior opportunity for cross-examination. The Supreme Court has held that the class of testimonial statements covered by the Confrontation Clause includes "affidavits . . . or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial statements such as affidavits. . ." *Id.* at 2531.

In *Melendez-Diaz*, the Supreme Court held that a certificate by an analyst stating that the substance found in the defendant's possession was cocaine was testimonial. In analyzing the certificate the Court noted that it was "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 2532. Moreover, the statement was made under circumstances that would lead an "objective witness reasonably to believe that the statement would be available for use later at trial." *Id.* In finding that the certificate was testimonial, the Court rejected the State's argument that the analyst who authored the certificate was

not subject to confrontation because the analyst was not accusatory. The Court noted that the certificate provided testimony against the defendant-it proved "one fact necessary for his conviction-that the substance he possessed was cocaine." Id. at 2532. Thus, the analyst was a witness against the defendant, and the defendant had the right to confront him.

The Court also rejected the State's argument that the certificate was a business record and therefore admissible as an exception to hearsay rule. The Court noted that a business record may not be admitted without confrontation if the regularly conducted business activity is the production of evidence for use at trial. Rather, records created for the sole purpose of providing evidence against a defendant must be subject to cross-examination. Id. at 2530-33. The Court specifically noted that a "clerk's certificate attesting to the fact that the clerk has searched for a particular business record and failed to find it" should be subject to confrontation because it would serve as substantive evidence against the defendant. Id. at 2539.

Based on the United States Supreme Court's analysis in *Melendez-Diaz*, the CCDR is clearly a testimonial document. The CCDR attests to the fact that the Defendant has been suspended in the 2nd degree and has not reinstated his license. Like the analyst's affidavit stating that the substance was cocaine and a clerk's certificate attesting to the fact that

certain record does not exist, the DOL's certification that Defendant has not reinstated his license must be subject to cross-examination.

Insofar as State v. Kirkpatrick, 60 Wash.2d 873 (2007) and State v. Kronich, 160 Wash. 2d 893, 161 P.3d 982 (2007) hold that a CCDR is not testimonial, those cases are supplanted by *Melendez-Diaz*. In both of those cases, the Supreme Court of Washington stated "The United States Supreme Court has not provided a comprehensive definition of what is 'testimonial' and 'non-testimonial' for purposes of determining confrontation rights . . . However, the Court has indicated that business records are not testimonial." Kronich, 160 Wash.2d at 902; Kirkpatrick, 160 Wash.2d at 882. *Melendez-Diaz* has clarified that affidavits like the cover letter of the CCDR fall squarely within the definition of testimonial evidence. In addition, the Court has clearly stated that even if affidavits admitted against defendants were traditional or official business records, "their authors would be subject to confrontation." Id. at 2538.

Moreover, in *Kirkpatrick*, the Court noted that "The United States Supreme Court also has yet to decide whether a certification as to the absence of a public record is testimonial evidence. Nationwide, courts have reached disparate conclusions on this point." Kirkpatrick, 160 Wash.2d at 884. The Court then proceeded to "hold that neither certification of DOL drivers'

records nor certifications as to the absence of such records are testimonial for purposes of Crawford." *Id.* In *Melendez-Diaz*, however, the Supreme Court explicitly held that a certification as to the absence of a public record is testimonial. This court is bound by *Melendez-Diaz*. "When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings." *State v. Radcliffe*, 164 Wash.2d 900, 906, 194 P.3d 250, 254 (2008).

Exhibit 10 was the only evidence that the HTO revocation was still in effect on April 15, 2005. See Court's Instruction No. 5 ("to convict" instruction). Without this improperly admitted exhibit, the evidence is insufficient to support his conviction. The conviction must be vacated and the case remanded for dismissal. See *State v. Smith*, 155 Wn.2d 496, 120 P.3d 559 (2005) (evidence was insufficient where the only evidence was the factual and legal fiction that the driver's license was "suspended/revoked in the first degree").

**B. The State's notice of discretionary review is untimely because it was filed within 30 days of the decision BUT after the King County Superior Court had issued its mandate. The King County Superior Court had no authority to *sua sponte* recall its mandate without notice to the parties.**

The King County Superior Court issued and filed its decision in this case on October 8, 2009. The State filed its notice of discretionary review on

November 6, 2009. However, the superior court had already issued its mandate on October 16, 2009. Appendix 2. The State did not make any motion to recall the mandate or bring the court's mistake to the court's attention. Then, in a letter dated November 10, 2009, the superior court clerk recalled the mandate without notice to the parties or intervention of the court. Appendix 3.

The superior court clerk had no authority to recall the mandate. While the mandate was issued early, the State made no attempt to bring the mistake to the court's attention and did not file a motion to recall the mandate. Having failed to do so, the State's notice of discretionary review filed after the mandate was issued is untimely.

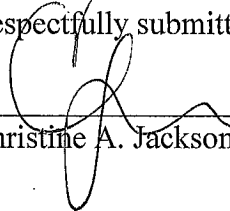
RALJ 9.2(b) directs the court to provide written notification of the superior court's decision to the lower court and the parties "not earlier than 30 days nor later than 60 days from the filing of the decision." Arguably, the superior court clerk had no authority to issue the mandate before the 30 days had elapsed. The lower court is required to comply with the mandate. RALJ 9.2(c). The RALJ does not provide the superior court clerk with the power to recall a mandate.

This stands in stark contrast to the RAP which provides this court with the authority to recall a mandate. RAP 12.7 states that the appellate

courts lose the power to change or modify its decisions once the mandate is issued. RAP 12.7, 12.5. Moreover, the courts have limited authority to recall a mandate. Such authority is expressly provided in RAP 12.9(a), (b). That rule expressly provides the appellate courts with the authority to recall a mandate to correct a mistake, among other things. RAP 12.9(b). But even so, a motion to recall the mandate must be brought and made within a reasonable time. RAP 12.9(c).

The RAPs do not apply to RALJ appeals by analogy. The RAPs are “completely unrelated rules” in many respects. City of Seattle v. Agrellas, 80 Wn.App. 130, 134-35, 906 P.2d 995 (1995). In promulgating the RALJ, the Washington Supreme Court did not provide the superior court, much less the clerk of the court, with the authority to recall a mandate. The superior court clerk acted without authority and acted without any notice to the parties. Moreover, when the State received the mandate, the State failed to take any action to bring the mistake to the court’s attention. The State’s failure to act is fatal. The notice of discretionary review is untimely and should be dismissed.

Respectfully submitted this 4<sup>th</sup> day of January, 2010,



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Christine A. Jackson#17192, Attorney for Respondent

## **APPENDIX 1**

RICHARD D. JOHNSON,  
Court Administrator/Clerk

*The Court of Appeals*  
of the  
*State of Washington*

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

December 9, 2009

Jerry Lincoln Taylor, JR  
King County Prosecuting Attorney  
516 3rd Ave Ste W554  
Seattle, WA, 98104-2362

Peter David Lewicki  
King County Prosecuting Attorney  
King County Courthouse  
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Devon Carroll Knowles  
Attorney at Law  
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Seattle, WA, 98104-1695

CASE #: 64327-4-I  
State of Washington, Respondent v. Laki Moimoi

Counsel:

The following notation ruling by Commissioner James Verellen of the Court was entered on December 9, 2009, regarding petitioner's motion for discretionary review:

Laki Moimoi seeks discretionary review of the superior court order on RALJ appeal affirming his conviction of unregistered contracting, arguing that the United States Supreme Court's recent decision in Melendez-Diaz v. Massachusetts,<sup>[1]</sup> precludes the admission of a certification that a search of public records reveals an absence of any current or prior contractor registration for Moimoi. The State agrees that discretionary review is appropriate to provide guidance on the impact of Melendez-Diaz on existing Washington caselaw allowing the use of such a certification.

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<sup>[1]</sup> --- U.S. ---, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

Because this matter presents an issue of public importance, discretionary review is granted. The parties do not need to appear for argument on Friday, December 11, 2009.

### **FACTS**

In the prosecution of Moimoi for the crime of unregistered contracting, the State offered a copy of a certified letter from the supervisor of records at the Department of Licensing that upon searching all records from January 1980 to present, she was unable to locate a previous or current contractor registration for Moimoi. Moimoi appealed his conviction.

In his RALJ appeal, Moimoi argued that the certification was testimonial and precluded by the holding of Melendez-Diaz. The RALJ court affirmed the conviction holding that unlike Melendez-Diaz, this case involved records routinely maintained by a government agency admissible as recognized in cases such as State v. Kirkpatrick.<sup>[2]</sup>

### **CRITERIA FOR DISCRETIONARY REVIEW**

Discretionary review of a RALJ court decision is available only:

- (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
- (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
- (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

RAP 2.3(d).

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<sup>[2]</sup> 160 Wn.2d 873, 161 P.3d 990 (2007).

**DECISION**

In Melendez-Diaz the Supreme Court held that a drug analyst's "certificate of analysis" was testimonial and fell within the scope of the confrontation clause. The question whether a certification of the results of a search of public records is distinguishable from a certificate of drug analysis for purposes of the confrontation clause is an issue of public interest warranting discretionary review.

Therefore, it is

**ORDERED** that the motion for discretionary review is granted and the clerk shall set a perfection schedule as soon as appellant either pays the filing fee, obtains an order of indigency signed by the superior court, or submits a motion to waive the filing fee based upon a showing of indigency.

Sincerely,

A handwritten signature in black ink, appearing to read 'R.D. Johnson', with a long horizontal flourish extending to the right.

Richard D. Johnson  
Court Administrator/Clerk

ssd

## **APPENDIX 2**

FILED

09 OCT 16 AM 11:00

KING COUNTY  
SUPERIOR COURT CLERK  
E-FILED  
CASE NUMBER: 08-1-03760-2 SEA

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON  
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,  
Plaintiff/Respondent

v.

CESAR VALADEZ CIENFUEGOS,  
Defendant/Appellant

NO. 08-1-03760-2 SEA  
Notification of Superior Court Decision on  
RALJ Appeal

Court of Limited Jurisdiction  
No. C00552665

I. BASIS

Pursuant to RALJ 9.2(c), the Clerk of the Superior Court shall transmit to the Court of Limited Jurisdiction and to all parties a copy of the Superior Court decision on an RALJ Appeal. The notification shall include as part of the final judgment, a summary of expenses allowed as costs pursuant to the RALJ 9.3(c) and 9.3(f). The costs listed below shall be collected by the Clerk of the Court of Limited Jurisdiction. When the costs awarded include the Superior Court filing fee, it shall be collected by the Clerk of the Court of Limited Jurisdiction and forwarded to the Superior Court Clerk.

II. NOTIFICATION

Therefore, this is to certify that the order of the **King County Superior Court** of the State of Washington, filed on **October 8, 2009**, became the decision terminating review of this court in the above entitled case. This cause is mandated to the **King County District Court, West Division, Seattle Courthouse**, from which the appeal was taken, for further proceeding in accordance with the decision. Copies of the decision will be mailed to the parties.

III. DECISION

The decision of the ☒ SUPERIOR COURT ☐ COURT OF APPEALS ☐ SUPREME COURT:

A. ☐ Affirms ☒ Reverses ☐ Modifies ☐ Dismisses ☐ Denies ☒ Remands  
on concession for vacation of  
of error conviction & dismissal

B. This Matter is remanded to the Court of Limited Jurisdiction.

IV. APPEAL BOND

A. ☐ Appeal Bond posted in Superior Court will be returned to the originating Court under separate mailing.

B. ☒ No Appeal Bond posted in Superior Court.

### V. COSTS

Pursuant to RALJ 9.3(a)(c) and 11.2(a) costs and attorney fees are awarded as follows:

Item	Awarded To	Amount
A. Costs		
B. Attorney Fees		
C. Other		

DATE: October 16, 2009

**Barbara Miner**  
Superior Court Clerk

*By: Thomas A. Knoblauch, Deputy Clerk*

Original: King County District Court, West Division, Seattle Courthouse

Cc: King County Prosecuting Attorney, District Court/RALJ Unit  
The Defender Association  
Superior Court File

# APPENDIX 3



## King County

Department of Judicial Administration  
Barbara Miner  
Director and Superior Court Clerk  
(206) 296-9300 (206) 296-0100 TTY/TDD

FILED

09 NOV 10 PM 3:53

KING COUNTY  
SUPERIOR COURT CLERK  
E-FILED  
CASE NUMBER: 08-1-03760-2 SEA

November 10, 2009

### VIA INTERDEPARTMENTAL MAIL

King County District Court,  
West Division, Seattle Courthouse  
KCC-DC-0320

RE: **State of Washington v. Cesar Valadez Cienfuegos**  
King County Superior Court Cause Number: **08-1-03760-2 SEA**  
Court of Limited Jurisdiction Number: **C00552665**

To Whom It May Concern:

Notification of Superior Court Decision on RALJ Appeal for the above-referenced case was mailed to you on October 16, 2009, which notified you of the Superior Court decision filed October 8, 2009. However, subsequently, a Notice of Discretionary Review to the Court of Appeals, Division I was filed in this case on November 6, 2009 (copy enclosed). As the case cannot proceed in a lower court until the Court of Appeals rules, the remand of this case is hereby recalled. If any exhibits were returned to you along with the notification, please return them to King County Superior Court.

A new Notification of Decision will be issued upon resolution of the appeal.

We apologize for any inconvenience.

Sincerely,  
Barbara Miner,  
Director and Superior Court Clerk

by: Thomas A. Knoblauch, Deputy Clerk  
Case Auditing Section, (206) 296-7852

cc: King County Prosecuting Attorney, District Court/RALJ Unit  
The Defender Association  
Superior Court file

enclosure (1)

*Seattle:*  
516 Third Avenue Room E609  
Seattle, WA 98104-2386

*Regional Justice Center:*  
401 Fourth Avenue North Room 2C  
Kent, WA 98032-4429

*Juvenile Division:*  
1211 East Alder Room 307  
Seattle, WA 98122-5598

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STATE OF WASHINGTON  
2010 JAN -4 PM 4:49